INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Beard v. *United States*, 222 F.2d 84	9
Gleckman v. *United States*, 80 F.2d 394, certiorari denied, 297 U.S. 709	7-8
Kirsch v. *United States*, 174 U.S. 595	8
Malone v. *United States*, 94 F.2d 281	8
Stinnett v. *United States*, 173 F.2d 129, certiorari denied, 337 U.S. 957	8
United States v. *Doyle*, 234 F.2d 788, certiorari denied, 352 U.S. 893	8
United States v. *Frank*, 245 F.2d 284, certiorari denied, 355 U.S. 819	8
United States v. *Massei*, 355 U.S. 595	10
United States v. *Slutsky*, 487 F.2d 832, certiorari denied, 416 U.S. 937	9

Statute:

Internal Revenue Code of 1954 (26 U.S.C.):	
Section 7201	2, 3

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1310

CHARLES A. ESSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court issued no written opinion. The opinion of the court of appeals (Pet. App. A1-A14) is reported at 520 F.2d 213.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1975 (Pet. 2), and a petition for rehearing with suggestion for rehearing *en banc* was

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denied on February 12, 1976 (Pet. App. A15). The petition for a writ of certiorari was filed on March 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government is required in a tax evasion prosecution based upon the bank deposits method to introduce into evidence copies of the taxpayer's deposit slips and the checks deposited into his business bank account.

2. Whether the evidence was sufficient to support the conviction.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C.), provides:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of three counts of willfully attempting to evade and defeat his income tax for the years

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1967, 1968 and 1969, in violation of 26 U.S.C. 7201. The court sentenced petitioner to a one-year prison term on the first count, and placed him on probation for two years for the remaining two counts, to begin at the expiration of the prison term (Tr. 1044).[1] The court of appeals affirmed (Pet. App. A1-A14).

The evidence may be summarized as follows: During the prosecution years, petitioner was the owner and operator of the Prospect Animal Hospital in Arlington Heights, Illinois (Tr. 157, 559). Petitioner was on the cash basis of accounting and usually made one bank deposit each week (Tr. 230, 513-514). During the investigation, petitioner told the Internal Revenue Service agents that his records consisted of a daily log book, patient cards, canceled checks and paid invoices (Tr. 34); and that each day he recorded his gross receipts in his daily log book from the patient cards (Tr. 39). Petitioner's accountant prepared the schedule of business income and expenses and petitioner's income tax returns from the daily log book (Tr. 40, 56). However, the accountant had no way of knowing whether petitioner's records were accurate because petitioner did not furnish the accountant with his canceled checks or bank statements (Tr. 64, 83).

Petitioner advised the agents that his gross receipts came in the form of checks and currency (Tr. 222). When asked whether his business receipts were deposited intact, petitioner replied that they

[1] "Tr." refers to the transcript of trial proceedings which, together with the exhibits, has been lodged with the Clerk.

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were, but not necessarily to any one bank account (Tr. 39, 168). Petitioner's principal business bank account was at the Bank & Trust Co. of Arlington Heights (Tr. 559), but during the prosecution years he also maintained nine savings bank accounts (Govt. Ex. 29, p. 1).

The government's proof was based on the bank deposits method (Govt. Ex. 29). Early in the investigation, the revenue agent advised petitioner that his bank deposits greatly exceeded the amount of his reported gross income, and asked whether he had any explanation. Petitioner said he could not explain the discrepancy (Tr. 36). A few weeks later, in response to the agent's questions, petitioner stated that he had no income, either taxable or nontaxable, that did not show up on his income tax returns (Tr. 37-38). At that time, he stated that he had some cash on hand from shooting dice in Italy during World War II, in 1944 and 1945, but would not disclose the amount or the place where it was hidden, except to say that it did not go into his bank accounts (Tr. 39, 162).

Petitioner told the agents that he had no gifts or inheritances (Tr. 41, 161); that there had been no inter-bank transfers of funds (Tr. 40); that he had not received any recoveries from court actions, or from casualty losses or other insurance claims (Tr. 161); that he had no notes receivable (Tr. 163); that he kept his business and personal funds in separate accounts (Tr. 167); that he very seldom paid any expenses in cash out of his undeposited receipts

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(Tr. 168); that he was not a member of any credit union (Tr. 159); that he had no income from pensions, trusts or annuities (Tr. 160); and that his sources of income were from the animal hospital, rental income, income from the sale of securities, dividends and interest (Tr. 160). When the investigating agents asked petitioner where he obtained the funds to purchase a cashier's check for $5,000 which he used to purchase securities, petitioner declined to answer (Tr. 189). On an earlier occasion, petitioner claimed that he had not bought any cashier's checks (Tr. 160).

During the investigation, petitioner alleged that his undeposited cash on hand at the end of each of the five years preceding 1969 was about $20,000 (Tr. 163, 205), and that as of November 21, 1969, he had about $10,000 of cash on hand (Tr. 162). Although virtually none of petitioner's bank deposit slips were available, the agents confirmed the amounts of petitioner's total bank deposits from his bank statements and examined every one of the 1,900 canceled checks written on the bank accounts and every savings account withdrawal (Tr. 228, 556). This process took about two years (Tr. 230-231) and proceeded with such detail in order to give petitioner credit for all nontaxable sources of funds during the years under examination (Tr. 565-580).

Petitioner's income and income tax liability, as reported on his tax returns and as reconstructed by the government under the bank deposits method, were as follows (Govt. Ex. 29):

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	Taxable Income		Income Tax	
Year	Reported	Reconstructed	Reported	Reconstructed
1967	$12,593.51	$ 53,812.45	$ 2,982.99	$24,096.46
1968	17,462.90	50,478.30	5,399.69	24,243.40
1969	42,541.19	64,173.16	19,466.60	34,523.22
Totals	$72,597.60	$168,463.91	$27,849.28	$82,863.08

During the investigation, the agents made copies of petitioner's canceled checks, bank statements and log books, plus about 20,000 patient cards (Tr. 171, 176, 205). The government eliminated from total gross deposits into petitioner's checking and savings account the following amounts for the years in issue: $59,570.62 in 1967, $64,080.63 in 1968, and $44,525.72 in 1969. These amounts represented possible nontaxable sources of income such as inter-bank transfers, checks drawn payable to cash or petitioner, cash withdrawals from savings accounts, repayments of loans by borrowers, federal income tax refunds, gross proceeds from sales of stock, gross proceeds from sales of commodities, real estate rental income, oil royalties, dividends received, and interest income included in bank deposits.

After deducting the non-taxable receipts and business costs and expenses, the government's computations were that petitioner had understated the net profit from his animal hospital business by $41,-218.94 in 1967, $33,681.90 in 1968 and $22,221.97 in 1969 (Govt. Ex. 29, p. 2; Pet. App. A6, n. 2).

At trial, the government's computations were buttressed by the testimony on cross-examination of one of the revenue agents. The agent stated that he and

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his colleagues had sent out 1,000 random inquiries to owners of animals that petitioner had treated during the prosecution years and that he received approximately 450 replies (Tr. 206). For 1967, petitioner's records showed that he had received $500-$600 from the persons who had replied. However, they reported that they had paid petitioner more than $1,900. For 1968 petitioner's records showed $1,200 but the replies showed that the correct figure was $2,400. Finally, for 1969 petitioner's records showed receipts of approximately $2,300. But the replies indicated that the true figure was about $4,200 (Tr. 209-210).

Petitioner did not testify at the trial. The defense produced several witnesses who claimed to have borrowed from and repaid large sums of currency to petitioner during the prosecution years (Pet. 10).

ARGUMENT

1. The theory of the bank deposits method of proving tax evasion is that the existence of bank deposits in excess of reported taxable income may indicate underreporting. While the bare fact of bank deposits would not prove that the depositor owed income tax on that amount, the fact that the deposits are taxable income can be established from the additional evidence that the depositor is engaged in a lucrative business or profession and is continuously receiving money and depositing it to his account and drawing from those funds for his own uses. See, *e.g.*, *Gleckman* v. *United States*, 80 F.2d 394, 399

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C.A. 8), certiorari denied, 297 U.S. 709; *Malone* v. *United States*, 94 F.2d 281, 287 (C.A. 7); *United States* v. *Doyle*, 234 F.2d 788 (C.A. 7), certiorari denied, 352 U.S. 893; *United States* v. *Frank*, 245 F.2d 284, 287 (C.A. 3), certiorari denied, 355 U.S. 819; *Stinnett* v. *United States*, 173 F.2d 129 (C.A. 4), certiorari denied, 337 U.S. 957. The calculations, of course, must eliminate non-income deposits. *Kirsch* v. *United States*, 174 F.2d 595 (C.A. 8).

Here the agents thoroughly investigated petitioner's finances, examined every one of the 1,900 disbursements from his bank accounts, and, in arriving at the receipts from his veterinary practice, deducted from his gross deposits every item shown to be properly deductible, *viz.*, inter-bank transfers, checks drawn to cash (to eliminate the possibility of improperly charging petitioner for redeposits), repayments of loans by borrowers, a federal income tax refund, proceeds from the sale of stocks and commodities, rental dividend and interest income, and oil royalties. Moreover, the agents were able to eliminate other possibilities of non-taxable income such as gifts or inheritances and insurance settlements, after petitioner acknowledged during the investigation that he had not received such items.

Despite the thoroughness of the agents' analysis of his finances, petitioner argues (Pet. 12-21) that his conviction cannot stand because the government failed to introduce into evidence his bank deposit slips and underlying checks. Although the government customarily introduces such evidence in tax

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evasion cases employing the bank deposits method of proof (see *United States* v. *Slutsky*, 487 F.2d 832 (C.A. 2), certiorari denied, 416 U.S. 937; *Beard* v. *United States*, 222 F.2d 84 (C.A. 4)),[2] the court of appeals correctly pointed out (Pet. App. A5-A6) that there is no rule requiring deposit slips to be introduced in every case. Here, the proof of petitioner's bank deposits rests on the equally reliable foundation of the agents' examination of petitioner's bank statements (see Tr. 403, 431-434).

Moreover, it was not practicable or necessary for the agents in this case to examine the microfilm records of petitioner's principal bank deposit slips and the checks. To do so would have required the examination of more than six million items (Tr. 229-230), a fruitless task which would have added nothing to the government's case.

2. Petitioner further argues (Pet. 9-11, 22) that the amounts claimed by the government to be unreported income arose from a "substantial cash accumulation" presumably on hand at the beginning of the prosecution years. During the investigation, petitioner claimed that he had some cash on hand from shooting dice in Italy during World War II, but would not disclose the amount or the place where it was hidden, except to say that it did not go into his bank accounts (Tr. 39). But petitioner also stated during the investigation that his undeposited

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[2] Neither *Slutsky* nor *Beard* supports petitioner's contention that the government must introduce deposit slips into evidence to prove tax evasion by the bank deposits method.

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cash on hand at the end of each of the five years preceding 1969 was about $20,000 (Tr. 163, 205), and on November 21, 1969, only a few weeks before the end of the last prosecution year, petitioner stated that he still had about $10,000 of cash on hand (Tr. 162).

Since petitioner's cash on hand during the prosecution years, according to his own claims, had diminished by only about $10,000, he has accounted for only a small part of the $96,000 of unreported income from his veterinary practice proved by the government. Moreover, it is unlikely that petitioner, who had nine savings accounts during these years (Govt. Ex. 29, p. 1), would allow $20,000 in cash to lie idle for years, earning no interest.

The jury was not bound to accept the testimony of petitioner's employee (Pet. 11, 22; Tr. 755-757) that petitioner made a practice of cashing checks for clients from funds in his wallet. At all events, the question nevertheless remains as to where petitioner obtained the funds to cash such checks. Since the government's investigation negated all possible sources of nontaxable funds, except those for which petitioner was given credit, plus the $10,000 of cash on hand, the inclusion of such cashed checks would not have distorted the reconstructed income figure because the money used to cash them must have constituted taxable funds. Cf. *United States* v. *Massei*, 355 U.S. 595.

Finally, petitioner attempts to account for some $77,000 of funds by claiming (Pet. 9-11, 22) that

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the government failed to give him credit for loan repayments allegedly made to him in cash in that amount during the prosecution years. Since there were no documents that evidenced this alleged $77,000 of loans, the jury was not required to give credence to this claim. Moreover, since the witnesses who testified about the loans were petitioner's sister (Tr. 366, 369), a relative by marriage (Tr. 747), a longtime friend (Tr. 826), a carpenter and builder to whom petitioner gave some $40,000 worth of business over the years (Tr. 814, 821), and an employee (Tr. 309), the jury was justified in rejecting their testimony. Indeed, petitioner never told the agents that he had made substantial cash loans to friends or relatives.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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